IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 220.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

Supplemental Brief for Defendant in Error.

By C. E. Warner.

There are two points or contentions in the brief of Mr. Ledyard in behalf of the express company to which we desire to advert briefly:

First. It is said that the penalty clause of the express and freight provision of the act indicates an intention to impose the tax "*indifferently* upon the carrier and shipper," as indicated by section 6, and that therefore the act leaves "it a

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matter of negotiation and contract between the parties which of them shall bear the burden of the tax" (p. 15 *et seq.*), and

Second. That the statute employs the *impersonal* expression in every instance in which it speaks of the affixing of the stamp, and that such precision of language cannot be ascribed to chance or accident (p. 20 *et seq.*).

I.

Penalty Clauses.

Regarding the first proposition, we submit that there is no inconsistency in the penalty clauses, but that they are entirely harmonious and are enacted for different purposes and to reach different offenses.

It may be admitted, for the purposes of argument, that the terms of section 6 requiring payment of taxes upon instruments are *indifferent* as between the persons or parties who shall issue an instrument and those for whose use or benefit the same shall be issued.

This section is, of course, *general* in its terms and application, and applies *indifferently* to all classes of persons and all classes of instruments.

In many respects, however, this *indifference* disappears as particular provisions are considered and different "*instruments, matters, and things*" are subjected to the burden of the tax.

Referring to the *penalty* provisions, section 7 provides—

"That if any person shall * * * *issue* or cause to be * * * *issued* any instrument * * * without the same

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being duly stamped * * * or without having thereon an adhesive stamp to denote such tax, such person * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a *fine* of not more than one hundred dollars, at the discretion of the court."

This section is not *indifferent*. It applies to any person who shall *issue* or cause to be *issued* the *instruments* mentioned in Schedule "A."

It imposes a penalty for the *issue* of such instruments irrespective of the *intent* with which it is done.

It is general in its application, and applies to any person who shall issue or cause to be issued the instrument without the stamp, and imposes a *money* penalty only.

Then comes section 13, which deals with the question of *intent*, and provides for *fine* or *imprisonment* or BOTH.

It provides:

"That any person or persons who shall * * * *issue* * * * or who shall cause to be *issued* * * * any instrument * * * mentioned in Schedule A of the act without the same being duly stamped or having thereupon an adhesive stamp for denoting the tax chargeable thereon, * * * *with intent to evade the provisions of the act*, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a *fine* not exceeding fifty dollars, or by *imprisonment* not exceeding six months *or both*, in the discretion of the court."

Intent is essential in this provision, and both *fine* and *imprisonment* may be imposed.

Then comes the "express and freight" clause.

Mr. Ledyard very properly says (p. 9) that the legislature intended to select for taxation *transactions* which were of fre-

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quent occurrence and of such a nature that they are evidenced by documents. He cites cases in which the transactions intended to be taxed "*might take place without the creation or delivery of any document,*" and mentions the "*transaction of carriage*" as one of them. Very true!! And it was to meet this very situation that the penalty clause was inserted in this paragraph.

The purpose was to *create* an *instrument* not theretofore required by law, nor necessary to the *transaction* in question, which might be stamped, and the penalty was therefore directed to the "*failure*" to "*issue*" such instrument.

Section 7, therefore, applies to the issue of such an instrument when "*intent*" is not essential, and imposes a *fine* only.

SEC. 13. When "*intent*" is essential and imposes both *fine* and *imprisonment*, in the discretion of the court, and the penalty in the "express and freight" clause is to the *failure* to *create* and *issue* the instrument at all.

It will therefore be seen, we think, that these different provisions are perfectly consistent and harmonious and furnish no ground for the criticism or contention of counsel for the express company as bearing upon the interpretation contended for by defendant in error.

Counsel, however, unduly *limits* this "express and freight" provision. The purpose, he says, is to "*create and bring into existence a document evidencing the shipment and capable of receiving a stamp.*" That is not the language. It is that the express company shall issue "*to the shipper.*" Not create or issue alone, but "*issue to the shipper,*" and this contemplates a "delivery to the shipper of this instrument" as a *completed legal* instrument—one with the stamp attached,

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as required by the act in question, and the penalties are directed against the failure to *issue* and the failure to stamp, with an additional penalty, if the failure to stamp is with intent to evade the act.

It is further said (p. 13) that section 6 contains the only words by which a stamp tax is imposed or by which any duty to pay is imposed upon any one.

Not so. The "express and freight" provisions, as applicable to carriers, is complete in itself. It stands alone. It imposes a duty just as certainly and effectually as section 6. Mark the language:

"It shall be the duty of every * * * express company * * * to issue to the shipper * * * a bill of lading * * * and there shall be duly attached and canceled as in this act provided * * * a stamp of the value of one cent."

Section 7 provides for attaching the stamp and section 9 for its cancellation, and this provision is therefore complete *without* section 6. Therefore we have in this provision alone the duty to *issue*, the duty to *stamp*, and the duty to cancel. Apply to it the penalty provisions of sections 7 and 13, and we have the act complete in itself, with penalties for its violation, without resort to section 6 at all.

As we have stated in our principal brief, when we have the *duty* enjoined upon the company to issue "*to the shipper*" the receipt and a penalty for failure to issue the same, and a further penalty under section 7 for a failure to stamp, expressly directed to the *person* who *shall issue* the instrument, and a still further penalty under section 13 for a failure to stamp "*with intent to evade the provisions of the act*," and this,

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again, expressly directed to "*the person* who shall issue or *cause to be issued*" said instrument, it would seem to logically follow that the person or company who or which was directed to issue the instrument was the one who was expected to pay the tax.

It would hardly be supposed that Congress intended to punish the person who *issued* an instrument by fine and imprisonment for the failure of the one "*for whose use or benefit it was issued*" to attach and cancel the stamp. This would be exceedingly illogical.

II.

IMPERSONAL PROVISIONS.

In reference to the so-called *impersonal* provisions of the act, counsel is again in error.

The act is not *impersonal* when it refers to the great corporations exercising public functions, like railroads, sleeping-car companies, express companies, steamboat companies, carriers, telephone companies, and telegraph companies.

Section 18 applies to *telegraph companies*, and it may be fairly argued that the duties of those companies are not clearly defined. They are, however, common carriers, and it is probable that they could not decline to transmit a message if the usual fees were tendered by the sender without the stamp. The duties of all the other companies, however, are certain and fixed, and the "*impersonal expression*" cannot be said to be used in regard to them.

Railroad companies, steamboat companies, carriers, and express companies are controlled by the "express and

freight" clause of the act, and we submit that their duty, under a fair reading of this clause, is manifest and clear. It is their duty to issue and deliver to the shipper the receipt, and their duty is not performed till they attach the stamp.

Telephone companies are covered by the act under the head of "*telephone messages.*" It is made the duty of "every person, firm, or corporation owning or operating any telephone line or lines" to make a sworn statement within the first fifteen days of the month, stating the number of messages transmitted during the preceeding month for which a charge of fifteen cents or more was imposed, "*and for each of said messages * * * the said person, firm, or corporation shall pay a tax of one cent.*"

Nothing impersonal about this.

And so with sleeping car companies section 28 provides for a tax of one cent for every seat sold in a palace or parlor car and on every berth sold in a sleeping car, "the stamp to be affixed to the ticket *and paid by the company issuing the same.*"

Passage tickets upon vessels to a foreign port are subject to taxation. They may be said to be impersonal, yet we understand it to be the rule of steamboat companies, precisely as railroads, to pay the taxes imposed by the act without question.

Counsel has selected for his illustration (p. 13) cases which are necessarily *impersonal* in character, like leases, mortgages, drafts, sales, powers of attorney, custom-house entries, &c.: but as a matter of every-day practical construction, so far as our observation extends, the stamp is in

every instance paid by the maker of the instrument—a lease by the lessor, mortgage by the mortgagor, drafts and checks by the drawers and makers, and so on indefinitely.

It may be entirely true that as between the parties to an agreement entirely voluntary in character, that Congress did not undertake to say, as between party and party, which should pay the tax. That may have been left to the agreement of the parties. Not so, however, as to these great public corporations in the exercise of public functions, possessing common-law obligations independently of strict contract. They carry on a business "affected with a public interest," possessing franchises and doing business in the several States, as in Michigan, only by permission and license. As so well said by Mr. Commissioner Atkinson, "*it was necessary to bring under the taxing power all the resources of all the people * * * and that it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and, taxing all others, exempt them alone from the operation of the law.*"

They derive great support and protection from the law, and it is only right that they should bear their share of the burden imposed upon all the people for the purpose of defraying the expenses of the military and naval forces engaged in the war with Spain.

III.

Counsel further argues (p. 24 *et seq.*) that when the companies found themselves confronted with the tax upon bills of lading, they found that if they assumed the burden them-

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selves they would be subjected to taxation infinitely greater than that laid upon any other class of the community, and they therefore argue that they had a right to shift the obligation upon the shippers by adding the amount of the tax to the rates before prevailing.

This would seem to be a poor reason for avoiding the obligation which the law had imposed upon the companies. In the language of the day, "*there are others*" who already have their own burdens imposed upon them by the law, and there would be no measure of justice in allowing them to escape all obligations to the Government which fosters and protects them, by shifting the burdens upon other shoulders.

Counsel argues that the obligations of the law are *indifferent* and *impersonal* as between shipper and carrier. If the company can decline to "carry" unless the shipper shall pay the tax, then it can with much greater reason, as regards all those *impersonal* matters which counsel refers to upon page 24 of his brief, like drawing checks, selling securities, issuing certificates of stock, &c., decline to do so unless the party "*for whose use or benefit*" they are made, drawn, or issued, shall pay the tax, and thus avoid all obligations for this common burden.

The burdensome character of the tax may be a good argument to address to the law-making power, but not to the court. It is precisely the complaint which the companies made under the acts of Congress of 1862, 1863, and 1864. As we have seen, the obligation was imposed under those acts almost precisely identical in terms with the present act, except as to amount. The companies did not then pretend that the tax was not imposed upon them, or that they had

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a right to shift the tax to other shoulders, but, on the other hand, practically admitted the obligation, and went to Congress for relief. Congress did relieve them by changing the the law from a specific tax on packages to a gross tax on receipts.

If the tax, therefore, is unduly burdensome, let the companies go to Congress, where there is authority to relieve them, and not attempt to shift the responsibility for their share of the public burden imposed by the war with Spain, to the shoulders of others who are bearing their own share of the burdens without murmur or complaint.

IV.

Counsel further says (p. 27) that the plaintiff in error is not a corporation, but an unincorporated association, purely the creation of private contract and without any privileges, franchises, or duties save such as are enjoyed by individuals pursuing the same business.

Not so again. By paragraph 7 of respondent's answer (Rec., p. 11) the company alleges—

"That respondent, regularly organized and existing under and by virtue of the laws of New York, and acting under regularly issued license of this State, by its organization and compliance with the laws of this State (Michigan), as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity* and to regulate the carrying on of its business by reasonable rules and regulations," &c.

This answer embodies the exact situation and completely refutes the contention of counsel.

We have discussed in our principal brief (p. 50 *et seq.*) the similarity between corporations and joint stock associations, which it is not necessary to repeat. For all practical purposes, they are the same, and it was so held by the supreme court of Michigan.

V.

We insist, therefore:

1. That the obligation to provide the stamp is upon the company and not upon the shipper.

2. That the company has no right to shift this burden to the shoulders of shippers by adding the tax to the rates theretofore prevailing.

3. That such acts are not regulations of rates, but merely an attempt to avoid and evade its own responsibility for the tax under the law.

4. That the judgment of the supreme court of Michigan should be affirmed.

C. E. WARNER,
Of Counsel for Defendant in Error.

No. 220.

Sup't. Brf. of Warner for D. E.

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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 7, 1899.

No. 220.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

We submit herewith a summary of the opinion of the Attorney General rendered August 26, 1898, upon a question as to the obligation of the United States Express Company to stamp receipts, bills of lading, &c., issued by it to the Government in cases where such company was engaged in transporting moneys and securities under contract with the Government.

TREASURY DECISION No. 19996.

The Secretary of the Treasury submitted for the decision of the Attorney General the question whether under the war-revenue act, the United States Express Company was required, when receiving money or securities for transpor-

tation for the Government under a contract for carriage between it and the Government, to issue to the consignor a bill of lading, manifest, or other receipt, with a one-cent stamp duly attached and canceled.

Under this contract the express company was employed exclusively by the United States as its transportation agent for the transportation of all moneys and securities belonging to the United States within certain territorial limits, and the contract fixed the rate of compensation.

It was contended by counsel for the express company that moneys and securities transported by it under this contract were exempt from the provisions of the act in question for the reason, among others:

2d. That in view of the fact that the amount of its compensation for carrying each shipment had been determined and agreed upon in advance, the imposition of a stamp tax upon each shipment was in effect a reduction of the compensation reserved to the company, and an impairment to that extent of the obligation of the contract, and an arbitrary and oppressive act under the guise of taxation.

The Attorney General considered this contention and held that receipts, bills of lading, or manifests issued by express companies under this contract were subject to stamp tax under the act of 1898.

The opinion may be summarized as follows:

a. That the imposition of the stamp tax neither impaired the obligation of the contract nor took private property for public use without compensation or without due process of law.

b. That while the imposition by way of stamp duty is commonly called a tax, nevertheless, considered in the light of the constitutional provision which regulates the levy of such taxes, it is not strictly a *tax*, but an *impost*, and that all duties, *imposts*, and excises must be uniform.

c. That the constitutional requirement of uniformity pertains to this particular piece of legislation, inasmuch as it is uniform upon all subjects of the same kind and class and "extends to all cases where goods are received for transportation by express companies, no matter whether the consignor be a municipality, a State, or the Federal Government itself, and without regard to whether such goods are received and transported under a continuing contract previously entered into or *under the ordinary obligation of a common carrier to take and transport the goods of all who apply and tender reasonable compensation.*"

d. That no difference is perceived in the effect of this law in its operation upon the express company, whether it transports goods for the Government under this contract and those instances where this or other companies are under similar contract with private persons at fixed rates established prior to the passage of the act and continuing during its operation.

e. That it would terminate the power of the Government to levy taxes and imposts if individuals were allowed to set up the plea that thereby their contracts were rendered less profitable than before, or even that their profits were more than balanced by the governmental exactions. "The payment of taxes in any form is not supposed to contribute to the profits of the subject, but to swell the funds of the Government. Taxes may be ruinous, but they, for that reason, are not unlawful. The power to tax is the power to destroy" (Marshall, Ch. J., McCulloch *vs.* Maryland, 4 Wheat., 431).

f. That the impost is not peculiar to this company nor to its business. It is general, uniform, and has no exceptions. It applies to all cases where previous contracts exist between the company and its shippers. It does not assume to nor does it in fact violate or impair a single condition of the contract.

g. That "*the act merely imposes upon the company a duty as to the issue of the receipt and the cancellation of the stamp, which are the methods for securing the payment of the impost intended to be laid for the high purpose of sustaining the Government in time of war.*"

h. That so long as the contractor is taxed uniformly with all others in the same line of business, upon the same transaction, and the tax is levied for appropriate objects of taxation, he cannot complain merely because his compensation or profits under his contract with the Government are thereby indirectly reduced. The contract is not affected. The *business of the contractor* is taxed, and it is not material whether the business is with private persons or with the taxing government itself.

i. That the express company is not exempt from the requirements of the war-revenue act in the transportation of money, securities, &c., for the Government.

MEMORANDUM.—It will be noted that the express company did not at this time contend, as in the case at bar, that the law was *impersonal* as between the company and the shipper, nor that it should be relieved because it was the duty of the Government "*for whose use or benefit*" the *instrument* (receipt) was to be issued under section 6, to pay the tax.

If it is the duty of the private shipper to pay the tax as between the express company and the shipper, then it was equally the duty of the Government, and the company should have been relieved on that ground. This obviously was not the attitude of the Attorney General, nor was it the contention of the company in that matter.

C. E. WARNER,
Of Counsel for Defendant in Error.

No. 220.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 220.

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

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OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

In Re RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.,

AND

In Re COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GA.
THE FRANKLIN PRINTING AND PUBLISHING CO.
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1898.

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OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been brought to the attention of this Commission that since the passage by the Federal Congress of an Act entitled: "An Act to provide ways and means to meet war expenditures, and for other purposes," that the Southern Express Company, a corporation engaged as a common carrier in the transportation of goods between points within this State, demands, as a condition precedent to *forwarding* goods tendered to it for shipment, that the consignor shall deliver to it the necessary revenue stamp to be affixed to the bill of lading required to be issued by such company, and complaint being made that the effect of the refusal to transport and deliver such goods, except upon compliance with such demands, was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by this Commission, an order was issued, calling upon the Southern Express Company to show cause why suits

should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a sum in addition to and in excess of rates prescribed by the Commission. In response to the rule thus issued, the express company, by its counsel, appeared and answered in effect, that this Commission had no jurisdiction to inquire and determine of and concerning the several matters and things set forth in said rule. Further, it denied that it had in any manner increased its charges for *forwarding* goods, or made any demand upon any person for any sum in excess of the rate fixed by this Commission. Further, it admitted that it had declined to receive goods for shipment unless the tax laid by the revenue act in question was tendered with the goods intended to be consigned, but denied that this Commission had any authority to inquire or act concerning any refusal by it to receive goods for transportation.

While under section 2196 of the Code of this State this Commission has full power, without notice, to institute suits for the penalty named in said section, "whenever, in their opinion, the circumstances authorize it," yet, in view of the great public interest involved, and in view of the many penalties which may have been incurred under a misapprehension of the true intent of the law, and in view of the volume of litigation which would necessarily result, if in each individual case a separate suit was instituted, the Commission caused the parties interested to be summoned before it, to the end that, before taking action in regard to the subject, it might be informed as to the respective rights of the consignor and carrier, and thus be able to determine whether in its refusal to accept for shipment and to *forward* goods tendered to it for transportation, without tender likewise of the necessary revenue stamps, the carrier was indeed

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acting in violation of the law, and whether, if so, the violation was of such a character as in the first instance to justify the application of the drastic remedies afforded by suits for penalties which may have been incurred.

This matter having been referred to me for examination, I herewith submit the conclusions reached, and, as well, a statement of the considerations which have induced that conclusion:

According to my conception of the issues made, two questions are presented for consideration, upon the proper solution of which will depend the correctness of the conclusion reached. The first of these is: Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamps to be affixed to the bill of lading required in the case of each consignment to be issued by the carrier? Second: If so, is the refusal to accept and forward such goods, except upon the conditions that the shipper shall bear the burden of the carrier to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this Commission for the transportation of such goods, a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

We will proceed to consider the questions proposed in the order in which they are above stated; and first, as to the duties imposed by the statute upon the respective parties. Duties may in the abstract be classified, as imposed and assumed. The former may be properly said to embrace and require the performance of that class of acts which are enjoined upon one by a mandate of some superior power which exercises a controlling influence over the will of him who is required to perform such acts. The mandate issued by such an authority operates

upon the subject whether he be willing or unwilling; and among this class of duties is included the performance of those acts enjoined by law, and which the subject is not at liberty to omit. Assumed duties are such as result from contract relations, respecting which each individual is primarily a free agent, and which can only arise in consequence of his having of his own volition entered into an agreement by the terms of which he has become bound to the performance of a given act. Duties, whether imposed or assumed, admit of another classification equally general. They may in either case be express or implied. The former includes all of those acts which have been expressly enjoined upon the subject by the mandate of a superior power; and as well, such as by the terms of his engagement he has directly pledged himself to perform. Without reference to the sources from which such duties may arise, they are equally binding upon the subject, though the methods of enforcing their performance may widely differ. Duties may be said to be implied where the acts to which they relate are neither expressly enjoined by the superior nor expressly assumed under the contract, but which are yet of such a character as that the performance of the act enjoined or assumed necessarily involves and includes the performance of some other incidental act respecting which both the mandate of the superior and terms of the engagement are silent. In such a case the law imposes as against the person bound to perform the particular act the duty likewise to perform such incidental acts as may be necessarily involved.

These distinctions are stated in order that we may more readily arrive at the true meaning and intent of the Federal Congress as that intent is manifested by the provisions of the law in question. Referring to the act under consideration, we find no express provision imposing directly upon the carrier the duty of furnish-

ing the revenue stamps required by the statute to be affixed to its bills of lading; and yet, upon a careful consideration of its various provisions it is difficult to resist the conclusion that such was the intention of the Congress. Section 7 of the revenue act referred to provides:

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

Section 6 of the act describes the classes of papers and documents to which the penal provisions of section 7 are made to apply, and refers for a more complete description to what is designated as Section A, this schedule enumerating in particular the documents generally described in sections 6 and 7. Under the heads of "Express and Freight" (Schedule A), we find the following provision:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation it is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles

or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used as evidence unless it shall be duly stamped as aforesaid."

It will be seen from these provisions that section 7 prohibits under a named penalty the issue of any paper or document without "same being duly stamped for denoting the tax hereby (meaning by this act) imposed thereon." It will be further seen that the act imposes upon the carrier the express duty of issuing in every instance a bill of lading covering each consignment. Since, therefore, this duty is imposed and the omission to perform it rendered penal, it necessarily follows that the person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to and consequently included in the duty to issue. We will test this view from another point of observation: The paper upon which the bill of lading is to be written is indispensable to the execution of such an instrument. Suppose in the absence of the statute the parties had entered into a contract of affreightment under which, upon a given consideration, the carrier assumed to transport the goods of consignor to a given point, what court would for an instant consider the proposition that the consignor, in addition to the rates prescribed by the contract, should be

charged with the duty of preparing the bills of lading? The duty of preparing the bill of lading is one springing out of the contract, and devolves necessarily upon the carrier unless the consignor varies the general rule and expressly assumes that burden.

Since the law imposes upon the carrier the duty of furnishing to the shipper a bill of lading, nothing short of a complete bill of lading, evidencing a completed contract of affreightment, will suffice; for unless it comes up to that standard it is not a bill of lading in contemplation of the statute, and since the affixing of the stamp, according to the very terms of the act, is indispensable to the evidence of a contract of affreightment, it follows that this is one of the incidental acts which is to be performed by the carrier; and since the law enjoins upon it the duty to affix the stamp (there being no express requirement that it shall be furnished by the consignor), the necessary and irresistible implication is that it shall be furnished by the person bound to affix it.

In the course of argument in this case it was urged that inasmuch as the statute did not expressly designate the person who should bear the cost of furnishing the requisite stamps, its silence respecting that subject was to be accepted as evidence of indifference upon the part of the Congress as to the person upon whom this duty devolved; and, as further emphasizing this idea it was pointed out that there were two penalties imposed by the Act; one against the carrier, pecuniary in its nature; the other against the consignor, which rendered an unstamped bill of lading inadmissible as evidence. I do not find in this circumstance any evidence of a legislative intent either to excuse the carrier from the duty of affixing and furnishing the requisite stamp or of an intent to leave the matter in such a state as to enable the carrier to impose this duty upon the shipper. On the

contrary, it would seem that the infliction of the penalty upon the consignor was rather designed as an additional safeguard against loss of revenue to the Government by making it to the interest of the shipper to see to it that the carrier in the first instance furnished to him such an evidence of the contract of affreightment as would be available to him in case his rights under such contract should ever be called in question. And since this could only be accomplished by stamping the instrument as required by law, the consignor was given a direct concern in seeing to it that the carrier had performed its duty of affixing and cancelling the stamp before accepting the bill of lading. If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it. If the penal act consisted in the failure to stamp a bill of lading subsequent to its issue, there might be some reason in holding that the consignor accepting such a bill of lading would be the person whose duty it was to stamp it; but since the penal act consists in the issue of an unstamped bill of lading, it necessarily follows that the one issuing the bill of lading must stamp it in order to avoid the penalty. If it had been the purpose of the Federal Congress to impose this burden upon the shipper, the most natural course would have been to require that an article presented for shipment should itself bear a cancelled stamp. Had this been done the duty would have been upon the shipper; because until a stamp was affixed the carrier would have been under no duty to receive the goods for shipment. But since on the other hand the Congress has seen proper to require a stamp to be affixed to the bill of lading,

which must itself originate with the carrier and be issued by him, the conclusion is inevitable that it was the purpose of the law to charge the carrier with the cost.

Aside from these considerations, when we take the broader view and consider the circumstances under which and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised to contribute to this common fund; that it is so far-reaching in its effects that none could escape the exactions of the tax-gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction and, taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax he is excused from all contribution to the general fund; for while other corporations are taxed upon special transactions and upon gross and net receipts, these corporations are exempted from that class of taxes and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice. The better conclusion is that when the Congress required carriers to issue a bill of

lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers; and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it.

We come now to consider whether or not the exaction of the cost of a revenue stamp from the shipper amounts to an "extortion," within the meaning of that term as employed in section 2187 of the Code. That Section provides as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

By the terms of the act creating this commission, power was conferred upon the Railroad Commission of Georgia relatively to intra-state business, in general and comprehensive terms, "to make reasonable and just rates." Section 2189 of the Code makes it the duty of and empowers the commission "to make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to the charges at any and all points for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing

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unjust discriminations in the transportion of freight and passengers on the railroads in this State," and other powers and duties not necessary here to enumerate. It was required to make and publish a "schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads. (See Code, section 3190.) By section 2187 it was made unlawful for a railroad company to charge other than such rates; and by section 2196 appropriate penalties are provided for violations of these sections. By an act subsequently passed (which is incorporated in section 2217 of the Code of this State), express companies, to the same extent as railroads, were placed under the control of the Commission; and it was provided in the last-named act that this Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by any such company or person," and the penalties prescribed against railroads for violations of the rules and regulations of the Commission were made applicable to express companies. In the exercise of these powers the Commission has prescribed maximum rates for express service, and has fixed the "prices" to be charged by express companies for the services required to be performed by them in and about the handling of express matter. As necessarily incidental to the duty of transportation which the law of this State imposes upon all carriers, there is the duty to receive and deliver goods tendered for shipment, in accordance with the directions of the consignor. Relatively to the process of conducting their business as such, carriers may make such rules and regulations as may be necessary to their protection; but they cannot under the guise of regulation by any method, directly or indirectly, increase to the shipper beyond the rates fixed by the

Commission the "price" of any service which it undertakes to perform, or impose upon him duties and burdens which are by law imposed upon it.

Under an ordinary contract of affreightment, entered into independently of any law fixing the rates to be charged, the carrier is not authorized to add to the price of agreed compensation any expense incidentally incurred by it in the execution of the contract of affreightment. This principle is well stated in a decision of the Supreme Court of the United States, in the case of Covington Stock Yards Co. *v.* Keith. (Vol. 139 Decisions of Supreme Court, U. S., p. 135.) It there lays down the rule to be: "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars."

Such being the rule, relatively to contracts in which the price of the service is fixed by agreement between the parties, the same principle would apply with equal force where the rate is prescribed by positive law. To say that a carrier could increase the prescribed rate by the exaction of a sum in addition thereto to cover an incidental expense incurred by it in the execution of its duty to transport would be to admit that, by indirection, it could lawfully accomplish the same end which by the terms of the statute it is prohibited from doing directly.

If, therefore, an express company, under the guise of a charge for receiving goods for shipment, could exact the payment in advance of the revenue tax which devolves upon it, it could as well demand for the same reason any other sum. If they may exact one cent for receiving goods, they may as well exact one hundred cents, and thus directly increase the cost of the service required by law to be performed by it far beyond that prescribed by the rates fixed by this Commission. The service required by law to be performed by the carrier, as we have seen, includes the receipt, transmission and delivery of goods offered for shipment. By the express terms of the statute this Commission is authorized to fix in advance the "price" of that service. It cannot demand from the shipper any sum for that service beyond the rate prescribed; and an effort to subdivide the service so as to enable it to make a charge beyond the prescribed rate is necessarily merely colorable, and is such a scheme or device to evade the law as ought not to be accepted as an excuse for its refusal to conform to the regulations of this Commission fixing rates. While it is true that under its right to make reasonable rules and regulations, compliance with which may be required as a condition precedent to the reception of goods for shipment, it has no right by these means to impose upon the shipper the burdens which otherwise under the law would rest upon it.

I am thus led to the conclusion that in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, it violates the provisions of the Act hereinbefore referred to, and incurs the penalties which are therein prescribed.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE SOUTHERN EXPRESS COMPANY FOR OVERCHARGE IN DEMANDING THAT SHIPPERS FURNISH REVENUE STAMPS TO AFFIX TO BILLS OF LADING OR RECEIPTS

On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission:

And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the Board:

J. D. MASSEY,
Secretary.

L. N. TRAMMELL,
Chairman.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE WESTERN UNION TELEGRAPH COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING TELEGRAPHIC DISPATCHES FOR TRANSMISSION THAT REVENUE STAMPS REQUIRED TO BE AFFIXED THERETO SHALL BE FURNISHED, AFFIXED AND CANCELLED BY THE SENDERS THEREOF, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been represented to the Railroad Commission of Georgia that the Western Union Telegraph Company, a corporation engaged in this State in the business of transmitting telegraphic dispatches for hire, since the passage by the Federal Congress of an Act approved June 13, 1898, entitled: "An Act to provide ways and means for meeting war expenditures and for other purposes," has exacted and continues to exact from senders of telegraphic dispatches, as a condition precedent to forwarding messages tendered to it for transmission between points within this State, the payment of the special tax imposed upon such messages by said Act; and complaint being made that the telegraph company by these means indirectly increases the cost of transmission of such dispatches beyond the rates fixed therefor by this Commission, an order was made calling upon it to show cause why suits should not be instituted against it for penalties incurred in consequence of such demand.

In response to this order the telegraph company, by its counsel, appeared and among other things answered in effect: that the sender of messages was, under the terms of the Act imposing the tax, primarily responsible for the tax, and that the duty was imposed upon him to affix to each message offered for transmission, stamps, showing that the tax had been paid.

This matter having been referred to me, I herewith submit for your consideration the conclusions which I have reached:

A telegraph company, under the laws of this State, is bound to transmit all legal messages tendered to it by any person, upon compliance with such reasonable regulations as it may lawfully make for its own protection. It will be necessary to consider only one of the questions presented in this case, and that is: Can a telegraph company lawfully decline to receive a message for transmission, to which the requisite revenue stamp has not been affixed and cancelled? The provisions of the law bearing upon this question are to be found in Sections 6, 7 and 18, and in Schedule A of that Act. Section 6 provides for a levy of a direct tax upon certain classes of written instruments and refers to schedule A for a more particular description of the instruments upon which the tax is levied. Section 7 of the act makes it penal for "any person to make, sign or issue any instrument" described in schedule A without the same being duly stamped with a stamp denoting the tax thereon. And in schedule A we find telegraphic dispatches specified as one of this species of instruments taxed. Since the Act in terms makes it penal for any person "to make, sign or issue" a telegraphic dispatch without first affixing thereto and cancelling the requisite stamp, it necessarily follows that the telegraph company is under no duty to accept for transmission any message until the

same has been thus stamped; and since there is no duty on the telegraph company to receive it for transmission without its first having been stamped, the burden of so preparing his message as to entitle him to have it transmitted necessarily falls upon the sender. This of course includes the furnishing, affixing and cancellation of the stamp by him before it is tendered for transmission.

Whatever of complication or doubt may have arisen in regard to this matter results from the language of section 18 of the Act. That section provides as follows:

"SECTION 1. That on and after the first day of July, eighteen hundred and ninety-eight, no telegraph company or its agent or employee shall *transmit* to any person any dispatch or message without an adhesive stamp, denoting the tax imposed by this Act, being affixed to a *copy* thereof, or having the same stamped thereon, and in default thereof shall incur a penalty," etc.

We do not think that this section relieves the sender of the duty of stamping the original message. The writing containing the message does not become a lawful dispatch or message until the revenue stamp has been affixed and cancelled; for without that it would have been issued against the prohibitions of the statute, and the law enforces no obligations and recognizes no duties springing out of an illegal act. When this is done, however, the general law imposes upon the company the duty of transmission. But further, section 18 of the Act provides that "no telegraph company shall *transmit* to any person any dispatch or message" without a stamp denoting the tax imposed thereon by the Act being affixed to a *copy* thereof, or having the same stamped thereon. This section is not intended to relieve sender, but only to impose upon the telegraph company a tax of one cent upon each message transmitted by it. Section 6 is directed against the

sender and commands him under a penalty not to issue (in other words tender) a message for transmission until it is stamped. Section 18 is directed against the telegraph company and commands it not to transmit a message to the addressee until a stamp has been affixed to a copy. The stamped original having been delivered to it for transmission, it is under a duty relatively to the sender to transmit; but after this duty arises, it is not at liberty to transmit until it has likewise caused a stamp to be affixed to a copy of such original. When once the sender has complied with the duty imposed upon him of stamping the original, he by that act raises as against the company the duty of transmission; and since this duty cannot be lawfully performed without affixing a stamp to a copy, the law imposes upon the company the duty of performing this incidental act. The copy referred to evidently means the paper delivered to the addressee, for the act of transmission commences when the message is forwarded over the wire and ends when it is delivered to the addressee. It is the completed act of transmission, and not the mere preparation to transmit, which the law pronounces penal; and therefore, since every act in the process of transmission, except delivery, may be lawfully done without the company affixing the stamp, the natural inference is that the stamp should be affixed by the company to the copy of the original presented by the sender, which is delivered to the addressee. On the other hand, if we construe the word "transmit," as referring to the performance of the act first required of the company in the process of forwarding the message, the copy referred to in the act must be stamped before the act can be performed; so that, whatever construction may be placed upon the word "transmit," it is apparent that it was the purpose of the Congress to require the company to stamp a copy.

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If, as according to the plain letter of section 7 of the act, it is the duty of the sender to stamp the original, it would have been idle to require a stamp to be placed upon the copy as provided by section 18, unless it was the purpose of the Congress to lay a tax both upon the sender and upon the person whose duty it was to transmit. This would seem to be the most natural construction of the Act, because by none other is it possible to force the telegraph company to contribute any sum whatever to the general fund; and it is not to be believed that the Congress, taxing all other institutions and occupations, should have specially exempted telegraph companies from the operation of this broad and comprehensive system of raising revenue. Inasmuch, however, as the telegraph companies, by requiring all messages offered for transmission to be stamped, demand of the sender no more than the law imposes upon him, it cannot be said that they have in any manner made an illegal exaction of him. If the companies transmit messages without likewise affixing the requisite stamps to copies thereof, such action upon their part cannot be said to be prejudicial to the sender or in violation of the rules of this Commission. It may give rise to a question between them and the Federal Government, involving the public revenues, but as it does not affect the rates prescribed by this Commission, it is a matter with which the Commission has no concern.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

On motion of Commissioner Crenshaw, it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be adopted as the opinion and judgment of the Commission, and it is thereupon further ordered: That the rule in said matter issued be and the same is hereby discharged.

By order of the Board:

L. N. TRAMMELL,
Chairman.

J. D. MASSEY,
Secretary.